[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

PETITION FOR RECONSIDERATION OR CLARIFICATION

GTE Service Corporation, on behalf of its domestic telephone, equipment & service companies

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

Their Attorney

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SUMMARY

The Second Report and Order endeavors to implement amended Sections 3(n) and 332 of the Communications Act by adopting standards for classifying mobile services as either commercial or private, categorizing existing mobile offerings, and determining which provisions of Title II should not be applied to the commercial mobile radio service ("CMRS"). In general, GTE agrees with the Commission's analysis and believes the rules adopted are consistent with Congressional intent. In three respects, however, the Second Report and Order should be reconsidered to better accomplish Congressional and Commission goals:

First, the Commission should forbear from applying Section 226 ("Telephone Operator Consumer Services Improvement Act" or "TOCSIA") requirements to CMRS providers. The Second Report and Order ignores substantial record evidence showing that forbearance is warranted under Section 332. Moreover, the regulatory parity decision fails to recognize that imposition of TOCSIA requirements will effectively require all cellular carriers to continue tariffing their services, notwithstanding the Commission's explicit finding that forbearance from tariffing for CMRS providers is in the public interest.

Second, the Commission should ensure regulatory parity for all types of CMRS. The Second Report and Order fails to address significant differences between PCS regulatory rights and responsibilities and those afforded to other CMRS services. For example, personal communications service ("PCS") providers may provide private services on part of their spectrum, offer a wide range of fixed services, and take advantage of relaxed filing requirements. In contrast, cellular carriers are subject to significant constraints in all such respects. To assure full and fair competition, the Commission should extend the same flexibility afforded to PCS providers to all types of CMRS, including cellular services.

Third, the Commission should clarify that all services meeting the definition of "commercial mobile radio service" are subject to Title II, regardless of their potential classification as enhanced services under Part 64 of the Rules. In some cases, mobile carriers offer services meeting the definition of CMRS under Section 332, but which might also be considered unregulated "enhanced" service not subject to Title II regulation under Commission policies predating enactment of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). In light of the new statutory revisions, clarification is necessary in order to eliminate uncertainty, to avoid unnecessary regulatory distinctions, and to minimize state regulation of innovative, advanced radio services.

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GTE Service Corporation ("GTE"), on behalf of its domestic telephone, equipment, and service companies, respectfully submits this Petition for Reconsideration or Clarification of the Second Report and Order in the above-captioned proceeding.[1] Specifically, GTE seeks reconsideration or clarification of three aspects of the Commission's decision. First, the Commission should forbear from applying the telephone operator services requirements of Section 226 of the Communications Act to commercial mobile radio service ("CMRS") providers. Second, the FCC should ensure regulatory parity for all types of CMRS, including new personal communications services ("PCS") and cellular service. Third, the Commission should clarify that all services meeting the CMRS definition are subject to Title II, regardless of their potential classification as enhanced services.

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[1] Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411 (1994) [hereinafter Second Report and Order]. Public Notice of the Second Report and Order was given at 59 Fed. Reg. 18493 (Apr. 19, 1994).

I. THE COMMISSION SHOULD FORBEAR FROM APPLYING TOCSIA REQUIREMENTS TO CMRS PROVIDERS

The Second Report and Order incorrectly states that "[n]o commenter has demonstrated how forbearing from applying TOCSIA to CMRS providers who are also either [Operator Service Providers] or aggregators would be consistent with the public interest."[2] This cursory holding cannot be reconciled with the record before the Commission: numerous commenters, including GTE, demonstrated that enforcement of TOCSIA[3] is not necessary to ensure just and reasonable rates and protect consumers, and that forbearance would be fully consistent with the public interest.[4] Moreover, the decision not to forbear from applying TOCSIA to CMRS providers fails to

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2 Second Report and Order, 9 FCC Rcd at 1490.

3 In August 1993, the Commission issued a declaratory ruling holding, inter alia, that various service offerings provided by cellular and other mobile service carriers cause such carriers to be classified as aggregators or operator service providers or both and thus subject to the requirements imposed pursuant to TOCSIA. TOCSIA Declaratory Ruling, 8 FCC Rcd 6171 (1993), petitions for recon. pending. Until the issuance of that ruling, the mobile industry was unaware that the Commission would take the position that TOCSIA applied to mobile services.

4 See Comments of Bell Atlantic at 27; Comments of GTE at 18-19; Comments of In-Flight Phone Corp. at 5-6; Comments of McCaw at 11 n.31; Comments of Motorola at 19; Comments of TRW at 32; Comments of Waterway Communications System at 10-12; see also Reply Comments of Coastel at 6-8; GTE at 9; Mobile Marine Radio at 8-9; Telephone and Data Systems ("TDS") at 6-7 (noting that TOCSIA requirements are "burdensome and unnecessary" and changing its position from the opening comments); cf. Comments of TDS at 20); TRW at 22; Waterway Communications Services at 1-2.

In contrast, no commenter specifically urged the Commission not to forbear from applying TOCSIA. Rather, the only requests for requiring compliance with TOCSIA came in the context of one-sentence, unsupported declarations that all the consumer protection provisions of Title II should be enforced. See Comments of California PUC at 8; Comments of General Communication, Inc. at 4. As noted in the comments and reply comments cited above and further explained in the instant Petition for Reconsideration, application of TOCSIA to CMRS is plainly not necessary to protect consumers.

recognize that imposition of such requirements would undermine the Commission's decision to forbear from tariffing.

Section 332 authorizes the Commission to forbear from applying Title II requirements to CMRS providers if three conditions are met. First, enforcement must not be necessary to assure just and reasonable rates and charges. Second, enforcement must not be necessary to protect consumers. Third, waiver must be consistent with the public interest.[5] All three prongs of this test are clearly met with respect to TOCSIA.

As an initial matter, application of TOCSIA is not necessary to ensure just and reasonable rates or to protect consumers. No party in this proceeding has suggested that users of mobile public phone services have been subject to the kinds of abusive practices that TOCSIA was intended to prevent, such as overcharges, "splashing" of calls, and blocking of access to preferred interexchange carriers ("IXCs"), nor does the Commission itself cite to abusive practices in the mobile wireless field warranting compliance with the requirements imposed under TOCSIA. To GTE's knowledge, none of the thousands of complaints to the Commission and Congress regarding these practices was filed by a customer of a mobile public phone service.[6] Indeed, for mobile service providers, there are strong incentives to stimulate usage by keeping rates low and ensuring that customers are informed regarding the identity of the service provider and the relevant charges.

In addition, the public interest is plainly disserved by application of TOCSIA to CMRS providers. Notwithstanding the lack of consumer benefits, application of

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5 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(b)(2)(A)(iii), 107 Stat. 312, 393 (to be codified at 47 U.S.C. § 332(c)(1)(A)).

6 Mobile public phone services were provided for several years prior to the release of the TOCSIA Declaratory Ruling with no apparent adverse impact on consumers, despite the lack of TOCSIA safeguards.

TOCSIA would cause unwarranted and excessive compliance costs. The Second Report and Order, without any basis, simply dismisses these costs. Under the Commission's TOCSIA Declaratory Ruling, all CMRS providers are automatically and involuntarily converted into operator service providers ("OSPs") by, for example, merely interconnecting to the interstate public switched telephone network and permitting indirect service users to pay for their usage with a credit card.[7] This is the case even if the service provider directly provides no mobile public phone services and is unaffiliated with any provider of such services.[8] As a result, every cellular carrier, ESMR, and PCS provider in the country could have to ensure that its switches are capable of branding roamer calls. Aside from the considerable and entirely unnecessary expense of doing so, universal branding of roamer calls would generate tremendous customer confusion.[9]

Furthermore, compliance with TOCSIA would be impossible in many contexts. CMRS carriers could not practically comply with an obligation to allow customers to access both cellular licensees (or all PCS licensees) in a market, especially if a customer is roaming, due in part to equipment software configurations and the arrangements with other carriers to handle roaming traffic.[10] Similarly, the underlying CMRS provider could not provide meaningful information about its rates, because the

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7 See TOCSIA Declaratory Ruling, 8 FCC Rcd at 6174-75.

8 Id. at 6175. This is so because of the mobile nature of such services. Because rental cars move, for example, a rental car equipped with a credit card phone could be driven anywhere in the country. Under the TOCSIA Declaratory Ruling, the underlying cellular carrier (or ESMR or PCS provider) wherever the car was located would unknowingly become an OSP.

9 For example, any cellular subscriber driving from D.C. to Florida might encounter branding messages from dozens of different cellular carriers in the course of a two-day trip. Based on the current network capabilities, branding could not be limited to roamer calls made by mobile public phone customers because service providers cannot distinguish different categories of roamers.

10 See 47 C.F.R. § 64.704(a)(1993).

charges to the customer are determined by an unaffiliated service provider.[11] Nor could the underlying CMRS carrier of the roaming traffic enforce compliance with aggregator requirements, because it would have no contractual or tariffed relationship with the public phone service provider.[12] Similarly, Airfone (and other air-to-ground providers) could not transfer calls to another air-to-ground provider, because the shared use of frequencies by such licensees along with the incompatibility of different carriers' equipment render transfer of calls infeasible as a technical matter.[13]

Finally, the decision not to forbear from enforcing TOCSIA is inconsistent with the Commission's general treatment of tariffing obligations for CMRS providers. While the Second Report and Order quite properly finds that tariff forbearance serves the public interest,[14] the TOCSIA Declaratory Ruling, if left undisturbed, transforms the underlying CMRS provider for any mobile public phone offering into an OSP, even if the offering is provided by an unaffiliated third party. As a result, under TOCSIA, such cellular carriers are required to file "informational" tariffs containing rates, terms, and conditions.[15] Consequently, to ensure compliance with TOCSIA, all CMRS providers will need to file tariffs regarding their general mobile offerings, negating the pro-competitive benefits of tariff forbearance.[16]

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11 Id. § 64.703(a)(3)(1993).

12 Id. §§ 64.703(e), 64.704(b), 64.705(a)(5)(1993).

13 Id. § 64.704(c)(1)(1993).

14 Second Report and Order, 9 FCC Rcd at 1479 (explaining that a tariff filing requirement could impede flexibility and responsiveness, remove incentives for price discounting and the introduction of new offerings, impose significant administrative costs, and generally limit competition).

15 47 U.S.C. § 226(h)(1)(Supp. V 1993).

16 TOCSIA allows the Commission to waive the tariffing requirements as of October 1994. Id. § 226(h)(1)(B). Even if the Commission exercises this waiver authority, CMRS providers still will have to maintain tariffs on file at least six months longer than the Commission determined to be in the public interest.

Against this background, GTE respectfully submits that the public interest analysis under Section 332 not only permits, but effectively compels forbearance from applying Section 226 to CMRS providers. In the absence of any evidence of consumer harm, there is no basis for imposing the substantial costs and burdens that TOCSIA would engender. Nor is there any need or benefit from requiring cellular carriers to continue tariffing such services.

II. THE COMMISSION SHOULD ENSURE REGULATORY PARITY FOR ALL TYPES OF CMRS, INCLUDING NEW PCS AND EXISTING CELLULAR SERVICES

The Second Report and Order "reflects the Commission's efforts to implement the congressional intent of creating regulatory symmetry among similar mobile services."[17] By amending Section 332 of the Communications Act of 1934 and establishing a new class of commercial mobile radio services, Congress sent a clear signal that competitive, functionally equivalent services should be subject to consistent regulatory treatment.

To accomplish the Congressional objective, the Commission is confronted with a difficult task. It must take multiple regulatory schemes and policies, and somehow interweave them.[18] Unfortunately, the Second Report and Order falls short of achieving the laudatory goal set by Congress, by creating fundamental regulatory distinctions between PCS and other CMRS offerings.

On its face, the Second Report and Order appears to satisfy Congress' objective by classifying functionally similar existing common carrier and private carrier services

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17 Second Report and Order, 9 FCC Rcd at 1413.

18 Among other things, the Commission now has four rule parts to govern competing service providers — Parts 20, 22, 24 [formerly 99], and 90. GTE recognizes the sheer magnitude of the logistical effort confronting the agency and the industry.

and, on a presumptive basis, personal communications services ("PCS") as CMRS.[19] Closer examination, however, reveals that, instead of ensuring a level playing field, the Second Report and Order has created or maintained regulatory disparities between PCS and other CMRS offerings, particularly cellular service. In effect, PCS is placed in a separate "cubbyhole" for regulatory treatment and is granted greater flexibility in responding to marketplace and consumer needs.

For example, the Commission's rules and policies specifically allow PCS licensees to provide private mobile radio service ("PMRS") on part of their spectrum while seemingly confining cellular carriers to the offering of common carrier equivalent services. The Commission's existing Part 22 cellular rules provide that "[t]ransmitters licensed for operation in services governed by this part may not be concurrently licensed or used for non-common carrier communication purposes."[20] In contrast, the Second Report and Order states that "PCS licensees . . . offer[ing] both commercial and private services will be issued a single CMRS license, but may seek authority to dedicate a portion of their assigned spectrum to PMRS."[21]

This distinction has practical significance for the efforts of PCS and cellular companies to compete with one another in meeting customer needs. The ability of cellular carriers to design arrangements that most completely respond to customer needs and demands is unnecessarily restricted by the Commission's current regulatory provisions. Moreover, cellular carrier offerings are subject to obligations — such as resale — that would not be imposed on the private services supplied by PCS operators. The competitive disparity created in this environment is readily apparent.

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19 Second Report and Order, 9 FCC Rcd at 1454-55, 1461. While the Commission establishes a presumption that PCS will be classified as CMRS, it grants each PCS provider an opportunity to make a showing that one or more of its services are private.

20 See 47 C.F.R. § 22.119 (1993).

21 Second Report and Order, 9 FCC Rcd at 1459.

At the same time, this situation can easily be resolved by affording equivalent flexibility to all competing mobile service providers. Providing other CMRS providers with the opportunity to dedicate spectrum to private usage would remove a substantial and unwarranted competitive advantage otherwise held by PCS providers, thus bringing the Commission's policies into closer conformance with the purposes of the Budget Act.

A second disparity is evident in the apparent respective ability of PCS and cellular operators to provide fixed services as an element of their offerings. PCS is defined very broadly to include "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks."[22] In contrast, the fixed services that cellular carriers may permissibly provide without a waiver are limited to those that are "incidental"[23] or Basic Exchange Telecommunications Radio Service ("BETRS").[24]

The FCC has "recognize[d] that there may be valid public interest reasons for allowing non-BETRS, fixed service,"[25] such as alarm systems or highway call boxes. In 1992, the Commission initiated a Notice of Proposed Rulemaking to overhaul the

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22 Amendment of the Commission's Rules To Establish New Personal Communications Services, 8 FCC Rcd 7700, 7713 (1993) [hereinafter Broadband PCS Order]. See 47 C.F.R. §24.5 (redesignated from 47 C.F.R. § 99.5) (definition of "personal communications services"); see also 47 C.F.R. §24.3 (redesignated from 47 C.F.R. § 99.3) (defining permissible communications for PCS).

23 47 C.F.R. § 22.308 (1993). Advance notification of the provision of incidental cellular service must be provided to the Commission. No comparable filing requirement is currently imposed on PCS licensees.

24 Id. § 22.930. See also Broadband PCS Order, 8 FCC Rcd at 7747. Section 24.3 — nor any other existing provision of Part 24 — contains no comparable limitation on PCS permissible communications.

25 Liberalization of Technology and Auxiliary Service Offerings, 5 FCC Rcd 1138, 1139 n.14 (1990).

regulations applicable to the common carrier mobile services,[26] which proposed, inter alia, "to eliminate the restriction limiting fixed service to Basic Exchange Telecommunications Radio Systems (BETRS)."[27] The FCC pointed out that "carriers currently wishing to provide a fixed-incidental service with compatible equipment must request a waiver to permit such use."[28] Because such waivers are routinely granted, the Commission concluded that the restriction on incidental fixed services is unnecessary.[29] This proposal was supported by commenting parties.

Under the existing PCS and cellular rules, however, PCS providers appear to have much greater latitude to incorporate fixed arrangements into their offerings than do cellular carriers. In light of Congress' mandate, such a result cannot be justified. If the Commission allows the liberal offering of ancillary fixed services by PCS providers, it must do so across the board for other CMRS providers. GTE therefore urges the Commission to state definitively that cellular providers have the same rights as PCS licensees to offer ancillary fixed services.

Finally, while the Second Report and Order purports to "establish a symmetrical regulatory structure,"[30] it ignores routine issues, such as application filing requirements, that must be addressed if similarly situated mobile service providers are to be integrated into a class of CMRS. Notably, the PCS rules provide for the grant of blanket licenses for each market and frequency block: "[A]pplications for individual sites are not needed and will not be accepted."[31]

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26 Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 7 FCC Rcd 3658 (1992) [hereinafter Part 22 Rewrite].

27 Id. at 3672.

28 Id.

29 Id.

30 Second Report and Order, 9 FCC Rcd at 1418.

31 47 C.F.R. § 24.11 (redesignated from 47 C.F.R. §99.11).

In the cellular service, on the other hand, the licensee must notify the Commission of any major or minor modifications to its authorization, including the addition or modification of cell sites.[32] In 1992, the Commission initiated a Notice of Proposed Rulemaking to overhaul the regulations applicable to the common carrier mobile services, and specifically proposed to eliminate application filings for internal cell sites.[33] This proceeding has understandably been delayed by the creation of CMRS; but in any event, it would continue to subject remaining sites to the existing filing requirements.[34] Requiring filings by one category of carrier but not the other creates imbalances in critical business and operational information held by direct competitors. Moreover, the filing and administrative costs incurred in complying with the filing regulations place cellular carriers at a significant pecuniary disadvantage. Accordingly, this discrepancy must be reconciled with the Congressional mandate for regulatory parity.

In summary, to satisfy Congress' objective of establishing "a symmetrical regulatory structure that [] promote[s] competition in the mobile services marketplace . . . [and] serve[s] the interests of consumers while also benefiting the national economy,"[35] cellular carriers should have the same flexibility afforded to PCS providers to tailor their offerings and design them consistent with individualized needs. This comparable and consistent treatment of competitive mobile services will serve the public interest.

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32 See 47 C.F.R. § 22.9 (d)(7) (1993).

33 Part 22 Rewrite, 7 FCC Rcd at 3667.

34 In a recently adopted Further Notice of Proposed Rulemaking, the FCC proposes further revisions to Part 22 of its rules, including eliminating licensing for internal cell sites. See FCC News Release, "FCC Proposes Further Revisions to Part 22 of the Rules Governing the Public Mobile Services" (Apr. 20, 1994).

35 Second Report and Order, 9 FCC Rcd at 1418.

III. THE COMMISSION SHOULD CLARIFY THAT ALL SERVICES MEETING THE DEFINITION OF CMRS ARE SUBJECT TO TITLE II, REGARDLESS OF THEIR POTENTIAL CLASSIFICATION AS ENHANCED SERVICES UNDER PART 64 OF THE RULES

The Second Report and Order endeavors to "interpret the statutory elements that define commercial mobile and private mobile radio service," and "using these definitions, [to] determine the regulatory status of existing mobile services and of personal communications services."[36] It also states that "all auxiliary services provided by mobile service licensees should be included within the definition of mobile services."[37] The Second Report and Order thus sets out an extensive review and classification of existing and future mobile offerings. Despite this listing, however, the appropriate treatment of certain important CMRS offerings remains uncertain.

Specifically, some offerings made available by CMRS providers involve protocol conversions and, accordingly, they could be classified as "enhanced" services under the Commission's Part 64 rules.[38] As mobile services increasingly adopt digital rather than analog technology, the likelihood of enhanced classifications will grow dramatically. Enhanced services, of course, are not subject to Title II pursuant to Part 64 of the Commission's Rules.[39] Enhanced and basic services may be subject to differing regulatory requirements and obligations at both the federal and state level. As a result, competitive CMRS offerings may be governed by disparate regulations, thus undercutting the Congressional goals.

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36 Id. at 1413.

37 Id. at 1424.

38 Enhanced services change the protocol or format of the communication, provide a subscriber with access to stored information, or change the content of the information. In contrast, basic services, which are subject to Title II regulation, do not alter the subscriber's communication.

39 See 47 C.F.R. § 64.702(a) (1993). To GTE's knowledge, the Commission has never considered whether the basic/enhanced dichotomy extends to mobile services.

The definition of "commercial mobile radio service" under amended Section 332 of the Communications Act, however, appears to override the basic/enhanced dichotomy with respect to mobile services for purposes of determining whether Title II applies. That is, if an offering is for profit, interconnected to the PSTN, and available to the public, Section 332 requires that it be considered a CMRS and subject to Title II.[40]

In light of the apparent conflict between Part 64 and Section 332, CMRS providers are unsure what regulatory requirements apply to some of their offerings. To eliminate this uncertainty, GTE urges the Commission to clarify that any service meeting the statutory standard for CMRS will be subject to Title II, even if it might otherwise be considered "enhanced" under Section 64.702 of the Rules. This clarification will assure consistency in the treatment of competitive CMRS offerings, avoid unnecessary distinctions, and minimize state regulation of innovative, advanced radio services.[41]

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40 Omnibus Budget Reconciliation Act of 1993, §§6002(b)(2)(A)(iii), 107 Stat. at 393, 395-96 (to be codified at 47 U.S.C. §§ 332 (c)(1)(A), (d)).

41 Under Section 332, state rate and entry regulation of CMRS offerings is generally preempted. Id. §6002(b)(2)(A)(iii), 107 Stat. at 394 (to be codified at §332(c)(3)).

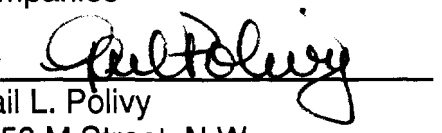
IV. CONCLUSION

GTE supports the Commission's efforts to implement provisions of the Budget Act dealing with the regulatory treatment of mobile services. In general, the rules adopted in the Second Report and Order are consistent with Congressional and Commission goals. However, as detailed above, three reconsideration or clarification actions are warranted.

First, the Commission should forbear from applying TOCSIA requirements to CMRS providers. Second, the FCC should act to ensure regulatory parity for all CMRS offerings, including new PCS and existing cellular services. Third, the agency should clarify that all services meeting the CMRS definition are subject to Title II, regardless of their potential classification as enhanced services under Part 64 of the Commission's Rules. These actions are necessary if the objectives of avoiding unnecessary regulatory distinctions and assuring full and fair competition among mobile services are to be achieved. In addition, such steps will help to ensure that the rules and policies adopted in this proceeding are consistent with Congressional consent.

Respectfully submitted,

GTE Service Corporation on behalf of its domestic telephone, equipment and service companies

By 

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

May 19, 1994

THEIR ATTORNEY

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the "Petition for Reconsideration or Clarification" have been mailed by first class United States mail, postage prepaid, on the 19th day of May, 1994 to all parties of record.

Ann D. Berkowitz